

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43202
Docket No. MW-42603
18-3-NRAB-00003-140316**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(Union Pacific Railroad Company former Missouri
(Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier wrongfully disqualified Restricted Cat Tamper Operator B. Killingsworth as a machine operator on March 18, 2013 (System File UP418WF13/1584249 MPR).**
- (2) The Agreement was violated when the Carrier wrongfully disqualified Restricted Cat Tamper Operator Q. Bratchett as a machine operator on March 18, 2013 (System File UP419WF13/1584247 MPR).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant B. Killingsworth shall have his disqualification as a machine operator removed, his qualifications reinstated and he shall be compensated ‘... for the difference in pay for each day between Machine Operator Restricted Cat Tamper Operator and System Trackman, including straight time and all overtime on each of the claim dates.....’ beginning on March 18, 2013 and continuing until the violation ceases.**
- (4) As a consequence of the violation referred to in Part (2) above, Claimant Q. Bratchett shall have his disqualification as a machine operator removed, his qualifications reinstated and he shall be compensated ‘... for the difference in pay for each day between**

Machine Operator Restricted Cat Tamper Operator and System Trackman, including straight time and all overtime on each of the claim dates.....' beginning on March 18, 2013 and continuing until the violation ceases."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

These claims, processed separately but identical in language for all pertinent correspondence, protest the disqualification of the Claimants as Machine Operators by letters dated March 22, 2013. The disqualifications were based upon an incident occurring on March 18, 2013 where the Carrier found that the Claimants failed to follow proper lock out-tag out (LOTO) procedures on the CATS-0903 machine they were working on by failing to notify the EIC they were going into LOTO, and failing to fill out the LOTO book. The disqualification letters also mention their inability to understand core concepts required in their position and taking approximately one hour to set up the machine, causing unauthorized overtime and loss of production. The record contains written statements from two Track Supervisors involved with the incident, as well as from each of the Claimants, who say that they were performing work tasks a distance away from their CATS-0903 machine when the mechanics were working on it and placed it into LOTO.

The Organization takes issue with the factual basis for the disqualifications, noting that the Claimants deny the allegation that they failed to properly LOTO their equipment. It argues that the Carrier used the Claimants' disqualifications as

punishment, rather than issuing discipline, and that, even if there was an arguable basis for disqualification on the CAT Tamper, the Carrier abused its discretion by issuing a general Machine Operator disqualification, effectively stripping the Claimants of their classification seniority. The Organization asserts that the breadth of the penalty imposed was excessive and harsh, and contrary to the Agreement which limits disqualification to the Claimants' assigned position - restricted continuous CAT tamper operator - and prevents the issuance of disqualification for loss of production.

The Carrier contends that the Claimants were disqualified for their inability to understand the core concepts of their position, which includes properly performing the LOTO procedure, applicable to all Machines Operator positions, a critical safety requirement. It stresses that it is the Carrier's right to set qualifications and determine fitness and ability, and that its determination can only be overturned if it is found to be arbitrary, citing Third Division Awards 32366 and 36957. The Carrier maintains that, since it was revealed on March 18, 2013 that the Claimants could not safely perform all of the functions of the Machine Operator job, the Organization is unable to sustain its burden of proving that their disqualification was arbitrary. It notes that the Claimants' statements, when compared with those of the supervisors directly witnessing or involved with the event, at best, reveal an irreconcilable dispute in fact, which is a further basis upon which to find that the Organization did not meet its burden of proof in these cases.

A careful review of the record convinces the Board that the Organization has failed to sustain its burden of establishing that the Claimants' disqualifications from all Machine Operator positions were arbitrary or an abuse of discretion. The Carrier supported its action with direct evidence of the reasons for the disqualification - the failure to properly perform the LOTO procedure on CATS-0903 on March 18, 2013 - and the fact that such safety procedure is required on all machines. While the Claimants' statements take issue with the allegation that they were the ones responsible for the LOTO when they were not at the machine when the mechanics started working, at best, the Organization has presented an irreconcilable dispute of fact, which is insufficient to meet its burden of proving that the Claimants' disqualifications were not a proper exercise of management's prerogative to determine fitness and ability, or were arbitrary. See, e.g. Third Division Award 36957.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of May 2018.